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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-88324; File No. SR-FINRA-2020-006]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify the Trade Reporting Fees Applicable to the FINRA/NYSE Trade Reporting Facility
March 5, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on February 28, 2020, Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend FINRA Rule 7620B (FINRA/NYSE Trade Reporting Facility Reporting Fees) to modify the trade reporting fees applicable to participants that use the FINRA/NYSE Trade Reporting Facility (“FINRA/NYSE TRF”).

The text of the proposed rule change is available on FINRA’s website at <http://www.finra.org>, at the principal office of FINRA and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The FINRA/NYSE TRF, which is operated by NYSE Market (DE), Inc. ("NYSE Market (DE)"), is one of four FINRA facilities³ that FINRA members can use to report over-the-counter ("OTC") trades in NMS stocks. While members are required to report all OTC trades in NMS stocks to FINRA, they may choose which FINRA Facility (or Facilities) to use to satisfy their trade reporting obligations.⁴

As discussed below, NYSE Market (DE) proposes to modify the trade reporting fees applicable to FINRA members that use the FINRA/NYSE TRF ("FINRA/NYSE TRF Participants" or "Participants"). Currently, the monthly fee for use of the FINRA/NYSE TRF is

³ The four FINRA facilities are the FINRA/NYSE TRF, two FINRA/Nasdaq Trade Reporting Facilities (together, the "FINRA/Nasdaq TRF"), and the Alternative Display Facility ("ADF" and together, the "FINRA Facilities").

⁴ Members can use the FINRA/NYSE TRF as a backup system and reserve bandwidth if there is a failure at another FINRA Facility that supports the reporting of OTC trades in NMS stocks. As set forth in Trade Reporting Notice (January 1, 2016) (OTC Equity Trading and Reporting in the Event of Systems Issues), a firm that routinely reports its OTC trades in NMS stocks to only one FINRA Facility must establish and maintain connectivity and report to a second FINRA Facility, if the firm intends to continue to support OTC trading as an executing broker while its primary facility is experiencing a widespread systems issue.

calculated using a tiered fee structure based on the reporting member's trading activity reported to the FINRA/NYSE TRF and, for some tiers, the reporting member's count of tape reports to the FINRA/NYSE TRF ("Trade Report Count"). NYSE Market (DE) proposes to (a) change the tier structure, such that all the tiers take into account the reporting member's Trade Report Count, while only some of the tiers take into account the reporting member's trading activity reported to the FINRA/NYSE TRF, and the number of fee tiers increases from nine to 13; and (b) exclude certain Participants from the fee.

If there were no change in reporting to the FINRA/NYSE TRF, such that Participants' reporting volume stayed the same as it was in the final quarter of 2019, under the proposed fee schedule the total monthly subscriber fees paid to the FINRA/NYSE TRF would decrease.

FINRA is proposing to amend FINRA Rule 7620B (FINRA/NYSE Trade Reporting Facility Reporting Fees) accordingly. There is no new product or service accompanying the proposed fee change.

Background

The FINRA/NYSE TRF

Under the governing limited liability company agreement,⁵ the FINRA/NYSE TRF has two members: FINRA and NYSE Market (DE). FINRA, the “SRO Member,” has sole regulatory responsibility for the FINRA/NYSE TRF. NYSE Market (DE), the “Business Member,” is primarily responsible for the management of the FINRA/NYSE TRF’s business affairs to the extent those affairs are not inconsistent with the regulatory and oversight functions of FINRA.

The Business Member establishes pricing for use of the FINRA/NYSE TRF, which pricing is implemented pursuant to FINRA rules that FINRA must file with the Commission and that must be consistent with the Act. The relevant FINRA rules are administered by NYSE Market (DE), in its capacity as the Business Member and operator of the FINRA/NYSE TRF on behalf of FINRA,⁶ and the Business Member collects all fees on behalf of the FINRA/NYSE TRF. In addition, the Business Member is obligated to pay the cost of regulation and is entitled to the profits and losses, if any, derived from the operation of the FINRA/NYSE TRF.

FINRA/NYSE TRF Participants are charged fees pursuant to Rule 7620B and may qualify for transaction credits under Rule 7610B (Securities Transaction Credit). In addition, pursuant to Rule 7630B (Aggregation of Activity of Affiliated Members), affiliated members can

⁵ See the Second Amended and Restated Limited Liability Company Agreement of FINRA/NYSE Trade Reporting Facility LLC. The limited liability company agreement, which was submitted as part of the rule filing to establish the FINRA/NYSE TRF and was subsequently amended and restated, can be found in the FINRA Manual.

⁶ FINRA’s oversight of this function performed by the Business Member is conducted through a recurring assessment and review of the FINRA/NYSE TRF operations by an outside independent audit firm.

aggregate their activity for purposes of fees and credits that are dependent upon the volume of their activity.⁷

The FINRA/NYSE TRF is smaller than the FINRA/Nasdaq TRF in terms of reported volume: FINRA members currently use the FINRA/NYSE TRF to report approximately 20% of shares in NMS stocks traded OTC. For example, from January through December 2019, the breakout of trade report activity among the FINRA Facilities was as follows:

<u>Facility</u>	<u>Number of Reported Shares</u>	<u>Percentage of TRF Total</u>
FINRA/NYSE TRF	132,423,476,814	20.06%
FINRA/NASDAQ TRF	527,748,470,214	79.94%

Competitive Environment

According to the Business Member, the FINRA/NYSE TRF operates in a competitive environment. The FINRA Facilities have different pricing⁸ and compete for FINRA members' trade report activity. In turn, FINRA members can choose which FINRA Facility they use to report OTC trades in NMS stocks. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and recognized that current

⁷ No change is proposed to be made to Rules 7610B or 7630B, and so there will be no change to the requirements for, or process of, securities transaction credits and the aggregation of affiliated member activity.

⁸ Because the FINRA/NYSE TRF and FINRA/Nasdaq TRF are operated by different business members competing for market share, FINRA does not take a position on whether the pricing for one TRF is more favorable or competitive than the pricing for the other TRF.

regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”⁹

FINRA members currently use the FINRA/NYSE TRF to report approximately 20% of shares in NMS stocks traded OTC, compared to approximately 80% for the FINRA/Nasdaq TRF. The Business Member believes that pricing is the key factor for FINRA members when choosing which FINRA Facility to use. FINRA members can report their OTC trades in NMS stocks to a given FINRA Facility’s competitors if they deem pricing levels at the other FINRA Facilities to be more favorable, so long as they are participants of such other facilities.

By amending the tier structure and expanding the number of tiers, the Business Member believes that the proposed fee change will more closely correspond to actual usage. Such a change would make the FINRA/NYSE TRF more competitive with the FINRA/Nasdaq TRF and give members more attractive options for trade reporting, potentially encouraging FINRA members to use the FINRA/NYSE TRF to report more than the approximately 20% of their shares in NMS stocks traded OTC that they currently use it for.

Proposed Amendments to Rule 7620B

Under Rule 7620B, FINRA/NYSE TRF Participants are charged a flat fee for access to the complete range of functionality offered by the FINRA/NYSE TRF rather than a separate fee for each activity (e.g., a per trade or per side fee for reporting a trade, a separate per trade fee for canceling a trade, etc.) or a separate fee for connectivity.¹⁰ Rather than charging the same fee to

⁹ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (File No. S7-10-04).

¹⁰ See, e.g., Rules 7510(a) and 7520 (trade reporting fees and connectivity charges for the ADF) and Rule 7620A (trade reporting fees for the FINRA/Nasdaq TRF).

all FINRA/NYSE TRF Participants irrespective of trading activity, the fees set forth in Rule 7620B are tiered.

The Current Monthly Fee

Pursuant to a recent change in the fee structure,¹¹ the monthly fee for use of the FINRA/NYSE TRF is calculated based on the Participant's share of total market volume reported to the FINRA/NYSE TRF. More specifically, the fees are based on the Participant's "FINRA/NYSE TRF Market Share" ("Market Share"), defined as the percentage calculated by dividing:

- a. the total number of shares reported to the FINRA/NYSE TRF for public dissemination (or "tape") purposes during a given calendar month that are attributable to a FINRA/NYSE TRF Participant, by
- b. the total number of all shares reported to the Consolidated Tape Association ("CTA") or the Nasdaq Securities Information Processor ("UTP SIP"), as applicable, during that period.

Where the Market Share is below 0.10%, the Participant's Trade Report Count is a second factor in determining the applicable monthly fee.

The following chart sets forth the current tiers:

<u>FINRA/NYSE TRF Market Share</u>	<u>Count of Tape Reports to FINRA/NYSE TRF</u>	<u>Monthly Participant Fee</u>
Greater than or equal to 1.25%	n/a	\$30,000
Greater than or equal to 0.75% but less than 1.25%	n/a	\$20,000
Greater than or equal to 0.50% but less than 0.75%	n/a	\$17,500

¹¹ See Securities Exchange Act Release No. 87205 (October 3, 2019), 84 FR 54219, 54224 (October 9, 2019) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2019-024). The operative date was October 1, 2019.

<u>FINRA/NYSE TRF Market Share</u>	<u>Count of Tape Reports to FINRA/NYSE TRF</u>	<u>Monthly Participant Fee</u>
Greater than or equal to 0.25% but less than 0.50%	n/a	\$15,000
Greater than or equal to 0.10% but less than 0.25%	n/a	\$10,000
Less than 0.10%	25,000 or more trade reports	\$2,000
Less than 0.10%	100 or more trade reports but fewer than 25,000 trade reports	\$750
Less than 0.10%	1 or more trade reports but fewer than 100 trade reports	\$250
Less than 0.10%	No trade reports	\$2,000

The Proposed Monthly Fee

Under the proposed fee, each Participant would still be charged a monthly fee for use of the FINRA/NYSE Trade Reporting Facility, with the exception that “Retail Participants” would not be subject to a monthly fee.

Retail Participants. A Participant would be a “Retail Participant” if substantially all of its trade reporting activity on the FINRA/NYSE TRF comprises Retail Orders. In turn, a “Retail Order” would mean an order that originates from a natural person, provided that, prior to submission, no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology.

The proposed amended Rule 7620B would set forth the definitions of “Retail Participant” and “Retail Order,” together with a description of the relevant requirements in a new paragraph (a) in Rule 7620B. The new paragraph would state that a Participant that wished to qualify as a Retail Participant and be exempt from the monthly fee in accordance with the Rule would be required to complete and submit to the FINRA/NYSE TRF an application form and a written attestation of its then-existing qualifications as a Retail Participant and its reasonable expectation

that it will maintain such qualifications for a one-year period following the date of attestation. In addition, the new text would state that a Retail Participant:

- would be required to complete and submit a written attestation to the FINRA/NYSE TRF on an annual basis to retain its status as such;
- would be required to inform the FINRA/NYSE TRF promptly if at any time it ceases to qualify or it reasonably expects that it will cease to qualify as a Retail Participant; and
- may be audited by the FINRA/NYSE TRF periodically.

The new text would also state that Participants would be required to contact the FINRA/NYSE TRF for the application and attestation forms,¹² and that if the FINRA/NYSE TRF approved a Participant as a Retail Participant on or prior to the twenty-seventh day of a month, then the approval would be deemed to be effective as of the first day of that month, whereas an approval that occurred after the twenty-seventh day of the month would be deemed effective as of the first day of the following month. If a Participant notified the FINRA/NYSE TRF that it ceased to qualify as a Retail Participant during a month, then such notification would be deemed effective as of the first day of the following month.

The proposed exemption, definitions and requirements would be consistent with the exemption, definitions and requirements for retail participants of the FINRA/Nasdaq TRF set forth in FINRA Rule 7620A.¹³

¹² The Business Member expects to make the required application and attestation forms available on the FINRA/NYSE TRF website.

¹³ See FINRA Rule 7620A, including the commentary thereto, and Securities Exchange Act Release No. 88135 (February 6, 2020), 85 FR 8079 (February 12, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2020-004).

Retail Participants would continue to receive unlimited use of the Client Management Tool, as well as full access to the FINRA/NYSE TRF and supporting functionality, e.g., trade submission, reversal and cancellation.

Proposed Tiers. The proposed amended Rule 7620B would set forth the fees for Participants that are not Retail Participants in a new paragraph (b) and would expand the current tier structure from nine to 13 tiers. Unlike now, the determination of the applicable tier would take into account the Trade Report Counts in every case. Only when the Trade Report Count is above 25,000 would the Market Share be a factor in determining the relevant tier. The following chart sets forth the proposed fee tiers for Participants that are not Retail Participants:

<u>FINRA/NYSE TRF Market Share</u>	<u>Count of Tape Reports to FINRA/NYSE TRF</u>	<u>Monthly Participant Fee</u>
Greater than or equal to 1.25%	More than 25,000 trade reports	\$30,000
Greater than or equal to 1.00% but less than 1.25%	More than 25,000 trade reports	\$25,000
Greater than or equal to 0.75% but less than 1.00%	More than 25,000 trade reports	\$20,000
Greater than or equal to 0.50% but less than 0.75%	More than 25,000 trade reports	\$15,000
Greater than or equal to 0.25% but less than 0.50%	More than 25,000 trade reports	\$10,000
Greater than or equal to 0.20% but less than 0.25%	More than 25,000 trade reports	\$7,500
Greater than or equal to 0.10% but less than 0.20%	More than 25,000 trade reports	\$5,000
Less than 0.10%	More than 25,000 trade reports	\$2,000
n/a	Between 15,001 and 25,000 trade reports	\$2,000
n/a	Between 5,001 and 15,000 trade reports	\$1,000
n/a	Between 101 and 5,000 trade reports	\$750
n/a	Between 1 and 100 trade reports	\$250
n/a	No trade reports	\$2,000

The Market Share would continue to be calculated in aggregate across all tapes¹⁴ and be based on the number of shares attributable to a FINRA/NYSE TRF Participant. A transaction is attributed to a Participant if the Participant is identified as the executing party in a tape report submitted to the FINRA/NYSE TRF. Such calculation would continue to be based on the data available for the prior full calendar month.¹⁵

The monthly fee would continue to be charged at the end of the calendar month and to apply to any Participant that is not a Retail Participant and has submitted a participant application agreement to the FINRA/NYSE TRF pursuant to Rule 7220B (Trade Reporting Participation Requirements). As is true now, if a new FINRA/NYSE TRF Participant submits the participant application agreement and reports no shares traded in a given month, the Participant would not be charged the monthly fee for the first two calendar months in order to provide time to connect to the FINRA/NYSE TRF.¹⁶ The monthly fees paid by FINRA/NYSE TRF Participants will continue to include unlimited use of the Client Management Tool, as well as full access to the FINRA/NYSE TRF and supporting functionality, e.g., trade submission, reversal and cancellation.¹⁷

Application of Proposed Fee Schedule

The proposed fee schedule will be applied in the same manner to all FINRA members that are, or elect to become, FINRA/NYSE TRF Participants. It will not apply differently to

¹⁴ There are three tapes: “Tape A” includes securities listed on the New York Stock Exchange, “Tape B” includes securities listed on NYSE American and regional exchanges, and “Tape C” includes securities listed on Nasdaq.

¹⁵ For example, the bill issued in June would be for the month of May, and would be based on shares reported during May.

¹⁶ As is the case today, after the first two calendar months, the Participant will be charged regardless of connectivity.

¹⁷ See 84 FR 54219, supra note 13 [sic], at 54221.

different sizes of Participants. Different types of Participants will be treated the same except that, as noted above, Retail Participants will not be charged a fee. For all other Participants, the determination of the applicable tier would be based on the Participant's Trade Report Count and, in some cases, FINRA/NYSE TRF Market Share. By expanding the structure from nine monthly Participant tiers to 13, the proposed rule change would create a more nuanced fee structure.

Proposed Exclusion of Retail Participants

The proposed exclusion of Retail Participants from the monthly fee is intended to improve the competitiveness of the FINRA/NYSE TRF for Retail Participants in light of recent initiatives by retail brokers to eliminate fees for executing retail customer transactions and the recent determination by the FINRA/Nasdaq TRF not to charge its retail participants any fees for trade reporting.¹⁸ Recently, some large retail brokers, such as Charles Schwab Corp., TD Ameritrade Holding Corp., and E*Trade Financial Corp., have removed commission trading fees for stock trades, leading to pressure on retail brokers to reduce operational costs.¹⁹ The Business Member believes that its proposal would support these efforts and attract Retail Participants to the FINRA/NYSE TRF.

Proposed Tiers

The current fee structure came into effect in October 2019. Based largely on its experience with the current fee structure over the last few months, the Business Member has identified two issues that the proposed change is meant to address.

¹⁸ See note 15 [sic], supra.

¹⁹ See 85 FR 8079, 8081; see also Lisa Beilfuss and Alexander Osipovich, "The Race to Zero Commissions," Wall Street Journal, October 5, 2019, at <https://www.wsj.com/articles/the-race-to-zero-commissions-11570267802>.

First, the current structure works on the general assumption that as a Participant's Market Share goes up its Trade Report Count will increase as well. Analyzing the fees paid under the current structure, the Business Member has found instances where that assumption is wrong: in such cases, a Participant may have a Market Share that is above 0.10% but may make only a few trade reports to the FINRA/NYSE TRF, resulting in a more substantial fee per trade than if the Participant had a lower Market Share. To address the issue, the Business Member proposes to take the Trade Report Count into account for every tier. At the same time, it proposes to reduce the current focus on Market Share.

Two examples show the effect of the proposed change:

- Assume that, during a given month, a Participant has a Market Share of 0.15% and makes two trade reports to the FINRA/NYSE TRF. Under the current structure, it has a monthly fee of \$10,000—the same fee that would apply if it had a Trade Report Count of 30,000. Under the proposed structure, because the Trade Report Count is taken into account, the hypothetical Participant would have a monthly fee of \$250 if it made two trade reports and \$5,000 if it made 30,000.
- Assume that, during a given month, Participant A has a Market Share of 0.02% and a Trade Report Count of 500, and Participant B has a Market Share of 0.12% and a Trade Report Count of 500. Under the current structure, Participant A has a monthly fee of \$750 and Participant B has a monthly fee of \$10,000, even though their Trade Report Count is the same. Under the proposed structure, both would be charged a monthly fee of \$750.

Currently, a Participant with a Market Share of less than 0.10% would pay a fee based on its Trade Report Count. Under the proposed structure, a Participant with a Market Share of less

than 0.10% would pay a fee based on its Trade Report Count only if that count was more than 25,000. In all cases, if a Participant had a Trade Report Count of 25,000 or less, the fee would depend on the Trade Report Count, and the Market Share would not be a factor in determining the tier. As a result, a Participant that has a Market Share above 0.10% but has a low Trade Report Count would not be subject to the more substantial fee per trade than it would be under the current structure, addressing the first issue that the Business Member identified with the current structure.

Second, under the current structure, in some cases the applicable monthly fee increases by up to \$10,000 when a customer moves from one tier to the next. As a result, for a Participant on the upper edge of a tier range, a relatively small increase in Market Share can result in a substantial fee increase. To address the issue, the proposal would increase the number of tiers to 13, adding granularity to the structure and decreasing the impact of changing tiers.

Three scenarios show the effect of the proposed change:

- Currently the monthly fee increases fivefold, from \$2,000 to \$10,000, if a Participant crosses the threshold between two of the middle tiers.²⁰ The proposed creation of two new tiers between them, with fees of \$5,000 and \$7,500 per month, would mean that the Participant would have to move three tiers to increase its fee from \$2,000 to \$10,000 per month.

²⁰ From a Market Share of less than 0.10%, to a Market Share greater than or equal to 0.10% but less than 0.25%.

- Currently the monthly fee increases from \$750 to \$2,000 if a Participant crosses the threshold between two of the lower tiers.²¹ The proposal would introduce a tier with a \$1,000 monthly fee between them.
- Currently the monthly fee increases from \$20,000 to \$30,000 if a Participant crosses the threshold between the two highest tiers.²² The proposal would introduce a tier with a \$25,000 fee, so that a Participant would not have its monthly fee increase by \$10,000 simply by crossing the threshold between two tiers.

In addition, the proposed fee schedule uses different threshold percentages for its tiers than the current fee schedule. The Business Member selected the proposed tiers and fees based on its evaluation of what thresholds and fees would create a more nuanced structure and would help address the described issues. In making its evaluation, the Business Member utilized its activity records and its analysis of the more detailed information on the FINRA website (the “OTC Transparency Data Website”).²³

To facilitate comparison, the following table shows the proposed and current tiers and monthly fees.

²¹ From a Market Share of less than 0.10% and Trade Report Count of 100 or more trade reports but fewer than 25,000 trade reports, to a Market Share of less than 0.10% and Trade Report Count of 25,000 or more trade reports.

²² From a Market Share greater than or equal to 0.75% but less than 1.25%, to a Market Share greater than or equal to 1.25%.

²³ <https://otctransparency.finra.org/otctransparency/AtsIssueData>. FINRA began reporting information regarding each firm’s aggregate non-ATS OTC volume (number of trades and number of shares) in December 2019, increasing the information available on the OTC Transparency Data Website. See Securities Exchange Act Release No. 86706 (August 19, 2019), 84 FR 44341 (August 23, 2019) (Order Approving File No. SR-FINRA-2019-019).

<u>Market Share & Trade Report Counts: Tiers</u>		<u>Monthly Fee</u>	
<u>Current</u>	<u>Proposed¹</u>	<u>Current</u>	<u>Proposed¹</u>
Greater than or equal to 1.25%	Greater than or equal to 1.25% <u>and</u> more than 25,000 trade reports	\$30,000	\$30,000
	Greater than or equal to 1.00% but less than 1.25% <u>and</u> more than 25,000 trade reports		\$25,000
Greater than or equal to 0.75% but less than 1.25%	Greater than or equal to 0.75% but less than 1.00% <u>and</u> more than 25,000 trade reports	\$20,000	\$20,000
Greater than or equal to 0.50% but less than 0.75%	Greater than or equal to 0.50% but less than 0.75% <u>and</u> more than 25,000 trade reports	\$17,500	\$15,000
Greater than or equal to 0.25% but less than 0.50%	Greater than or equal to 0.25% but less than 0.50% <u>and</u> more than 25,000 trade reports	\$15,000	\$10,000
	Greater than or equal to 0.20% but less than 0.25% <u>and</u> more than 25,000 trade reports		\$7,500
Greater than or equal to 0.10% but less than 0.25%	Greater than or equal to 0.10% but less than 0.20% <u>and</u> more than 25,000 trade reports	\$10,000	\$5,000
Less than 0.10% <u>and</u> 25,000 or more trade reports	Less than 0.10% <u>and</u> more than 25,000 trade reports	\$2,000	\$2,000
	Between 15,001 and 25,000 trade reports		\$2,000
	Between 5,001 and 15,000 trade reports		\$1,000
Less than 0.10% <u>and</u> 100 or more trade reports but fewer than 25,000 trade reports	Between 101 and 5,000 trade reports	\$750	\$750
Less than 0.10% <u>and</u> 1 or more trade reports but fewer than 100 trade reports	Between 1 and 100 trade reports	\$ 250	\$250
Less than 0.10% <u>and</u> no trade reports	No trade reports	\$2,000	\$2,000

¹ Under the proposed change, Retail Participants would not be subject to monthly fees.

Anticipated Application of the New Structure

It is not possible to fully predict the number of FINRA members that are likely to become FINRA/NYSE TRF Participants, how many Participants would be subject to each of the proposed tiers, or whether there will be an appreciable increase—or decrease—in reporting to the FINRA/NYSE TRF.²⁴ The Business Member anticipates that the proposed pricing will incentivize Participants to increase their reporting to the FINRA/NYSE TRF.

If there were no change in reporting to the FINRA/NYSE TRF, such that Participants' reporting volume stayed the same as it was in the final quarter of 2019, under the proposed fee schedule, the total monthly subscriber fees paid to the FINRA/NYSE TRF would decrease. Based on those assumptions, 28 Participants would have no change in their fees and seven Participants would have a decreased or no fee. Of those seven, one would go from \$17,500 to \$15,000, one would go from \$10,000 to \$7,500, and two would go from \$10,000 to \$5,000. The three Retail Participants would go from \$2,000 to \$0.

The following table suggests how the new tiers would apply if more FINRA members were Participants. Using FINRA data for activity reported to the FINRA Facilities in December 2019 from FINRA's OTC Transparency Data Website, the table indicates the number of firms that would be subject to each tier if all FINRA members were reporting to the FINRA/NYSE TRF subject to the current or proposed fee. For the proposed fee, the table shows the number of

²⁴ The Business Member does not propose to change the revenue sharing structure. The Business Member notes, however, that the proposed pricing may increase revenue sharing by encouraging Participants that have a Trade Report Count of zero to make trade reports to the FINRA/NYSE TRF in order to reduce their fees from \$2,000 to \$250, \$750 or \$1,000. The Business Member believes that the increase in reporting would increase such Participants' revenue share as well as decrease their fee.

firms that would be in each tier were they to report 25%, 50% or 100% of their activity to the FINRA/NYSE TRF.

<u>Market Share & Trade Report Counts: Tiers</u>		<u>Number of Firms per Tier Under Current Fee</u>	<u>Number of Firms per Tier Based on Percentage of Reported Volume¹</u>		
<u>Current</u>	<u>Proposed</u>		<u>25%</u>	<u>50%</u>	<u>100%</u>
Greater than or equal to 1.25%	Greater than or equal to 1.25% <u>and</u> more than 25,000 trade reports	6	2	3	6
	Greater than or equal to 1.00% but less than 1.25% <u>and</u> more than 25,000 trade reports		0	0	2
Greater than or equal to 0.75% but less than 1.25%	Greater than or equal to 0.75% but less than 1.00% <u>and</u> more than 25,000 trade reports	6	0	3	4
Greater than or equal to 0.50% but less than 0.75%	Greater than or equal to 0.50% but less than 0.75% <u>and</u> more than 25,000 trade reports	6	1	2	6
Greater than or equal to 0.25% but less than 0.50%	Greater than or equal to 0.25% but less than 0.50% <u>and</u> more than 25,000 trade reports	9	5	10	6
	Greater than or equal to 0.20% but less than 0.25% <u>and</u> more than 25,000 trade reports		1	1	3
Greater than or equal to 0.10% but less than 0.25%	Greater than or equal to 0.10% but less than 0.20% <u>and</u> more than 25,000 trade reports	20	8	7	7
Less than 0.10% <u>and</u> 25,000 or more trade reports	Less than 0.10% <u>and</u> 25,000 or more trade reports	20	22	25	20
	Between 15,001 and 25,000 trade reports		9	2	5
	Between 5,001 and 15,000 trade reports		6	9	4

Less than 0.10% <u>and</u> 100 or more trade reports but fewer than 25,000 trade reports	Between 101 and 5,000 trade reports	81	66	71	83
Less than 0.10% <u>and</u> 1 or more trade reports but fewer than 100 trade reports	Between 1 and 100 trade reports	96	124	111	98
Less than 0.10% <u>and</u> no trade reports	No trade reports	0	0	0	0

¹ Number of firms that would be in each tier had the firm reported 25%, 50% or 100% of its activity to the FINRA/NYSE TRF. Total activity based on data posted on the OTC Transparency Data Website for December 2019.

FINRA has filed the proposed rule change for immediate effectiveness. The operative date will be March 1, 2020.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b) of the Act,²⁵ in general, and Section 15A(b)(5) of the Act,²⁶ in particular, which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls. FINRA also believes that the proposed rule change is consistent with Section 15A(b)(6) of the Act,²⁷ which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA also believes that the proposed rule change is consistent with Section 15A(b)(9) of the

²⁵ 15 U.S.C. 78o-3(b).

²⁶ 15 U.S.C. 78o-3(b)(5).

²⁷ 15 U.S.C. 78o-3(b)(6).

Act,²⁸ which requires that FINRA rules not impose any burden on competition that is not necessary or appropriate.

As a general matter, the proposed fee schedule will be assessed in the same manner on all FINRA members that are, or elect to become, FINRA/NYSE TRF Participants. It will not be applied differently to different sizes of Participants. Different types of Participants will be treated the same except that, as noted above, Retail Participants will not be charged a fee. Access to the FINRA/NYSE TRF is offered on fair and non-discriminatory terms.

The Proposed Rule Change is an Equitable Allocation of Reasonable Fees

FINRA believes that the proposed rule change is an equitable allocation of reasonable fees for the following reasons. The Business Member believes that the proposal to exempt Retail Participants from the monthly fee is reasonable for several reasons.

Given the recent initiatives by retail brokers to eliminate fees for executing retail customer transactions, the Business Member believes that the proposed rule change would demonstrate that the FINRA/NYSE TRF is sensitive to current and potential Retail Participants' changing business models and operational costs. In addition, given the recent determination by the FINRA/Nasdaq TRF not to charge its retail participants any fees for trade reporting, the Business Member believes that the proposal is a reasonable means of strengthening the ability of the FINRA/NYSE TRF to compete for trade reporting activity, given that the proposal will treat Retail Participants in the same manner as the competing FINRA TRF, while offering current and potential Participants more attractive options for trade reporting. The Business Member notes that even as it proposes to eliminate trade reporting fees for Retail Participants, such Retail Participant activity should continue to contribute to operating the FINRA/NYSE TRF insofar as

²⁸ 15 U.S.C. 78o-3(b)(9).

the FINRA/NYSE TRF will continue to receive a share of the CTA and UTP SIP transaction credits generated through retail trade reporting activity that occurs on the FINRA/NYSE TRF.

The Business Member believes that the proposed exemption, definitions of “Retail Participant” and “Retail Orders” and requirements for Retail Participants would be reasonable, as they would be consistent with the exemption, definitions and requirements for retail participants of the FINRA/Nasdaq TRF set forth in FINRA Rule 7620A.²⁹ Using substantially similar definitions and requirements would enhance consistency and predictability for potential Retail Participants.

With respect to Participants that are not Retail Participants, the proposed structure would take the Trade Report Count into account for every tier. At the same time, it would reduce the current focus on Market Share. Specifically, if a Participant had a Trade Report Count of 25,000 or less, its Market Share would not be a factor in determining its fee. As a general matter, the proposed fees are designed such that more active Participants have a higher fee, while less active Participants pay less. By removing Market Share as a factor in determining the relevant tier for Participants with Trade Report Counts of 25,000 or less, the Trade Report Count would become the determinative factor. The Business Member believes that this proposed change would be equitable because for Participants with a lower Trade Report Count, their monthly fee would be tied to the number of trades, and not their size.

In addition to exempting Retail Participants from the fee, the proposed changes to Rule 7620B would expand the tier structure from nine monthly Participant fees to 13. As a result, for a Participant on the upper edge of a tier range, a relatively small increase in Market Share would

²⁹ See note 15 [sic], supra.

not result in as substantial a fee increase as under the present structure, thereby adding granularity to the structure and decreasing the impact of changing tiers.

The proposed fee schedule uses different threshold percentages for its tiers than the current fee schedule. The Business Member selected the proposed tiers and fees based on its evaluation of what thresholds and fees would create a more nuanced structure and would help address the described issues. In making its evaluation, the Business Member utilized its activity records and its analysis of the information on the OTC Transparency Data Website.

The Proposed Rule Change is not Unfairly Discriminatory

FINRA believes that the proposed rule change is not unfairly discriminatory for the following reasons.

As proposed, Retail Participants would be exempted from the monthly fee for using the FINRA/NYSE TRF. The Business Member does not believe that it would be unfair to do so, as the proposed rule change would demonstrate that the FINRA/NYSE TRF is sensitive to current and potential Retail Participants' changing business models and operational costs. Importantly, the proposed exemption would align the fees of the FINRA/NYSE TRF with those of the FINRA/Nasdaq TRF, which does not charge its retail participants any fees for trade reporting.³⁰ In addition, as noted above, the total fees paid by Retail Participants are relatively small: of the 35 FINRA/NYSE TRF Participants in December 2019, three were Retail Participants. Under the proposed rule, their monthly fees would go from \$2,000 to \$0.

The Business Member notes that the proposed changes in the fees for other Participants were not designed to offset the loss of Retail Participant trade reporting fees. Indeed, if there were no change in reporting to the FINRA/NYSE TRF, such that Participants' reporting volume

³⁰ See note 15 [sic], supra.

stayed the same as it was in the final quarter of 2019, under the proposed fee schedule, the total monthly subscriber fees paid to the FINRA/NYSE TRF would decrease even if Retail Participants were not exempted from the monthly fee.

FINRA members currently use the FINRA/NYSE TRF to report approximately 20% of shares in NMS stocks traded OTC, compared to approximately 80% for the FINRA/Nasdaq TRF. The Business Member believes that pricing is the key factor for FINRA members when choosing which FINRA Facility to use. FINRA members can report their OTC trades in NMS stocks to a given FINRA Facility's competitors if they deem pricing levels at the other FINRA Facilities to be more favorable, so long as they are participants of such other facilities.

The Business Member believes that the proposed fee change may encourage more FINRA members to become FINRA/NYSE TRF Participants, including both Retail and non-Retail Participants, and use the FINRA/NYSE TRF to report trades. Such a change would make the FINRA/NYSE TRF more competitive with the FINRA/Nasdaq TRF and give members more attractive options for trade reporting, potentially encouraging FINRA members to use the FINRA/NYSE TRF to report more than the approximately 20% of their shares in NMS stocks traded OTC than they currently use it for.

With respect to Participants that are not Retail Participants, the proposed structure would take the Trade Report Count into account for every tier. At the same time, it would reduce the current focus on Market Share. Specifically, if a Participant had a Trade Report Count of 25,000 or less, its Market Share would not be a factor in determining its fee. As a general matter, the proposed fees are designed such that more active Participants have a higher fee, while less active Participants pay less. By removing Market Share as a factor in determining the relevant tier for Participants with Trade Report Counts of 25,000 or less, the Trade Report Count would become

the determinative factor. The Business Member believes that this proposed change would not be unfairly discriminatory because for Participants with a lower Trade Report Count, their monthly fee would be tied to the number of trades, and not their size.

Finally, the Business Member believes that dividing the proposed rule into paragraphs (a) and (b) would make Rule 7620B easier for market participants to understand and to locate relevant information, thereby increasing the clarity and transparency of the Rule.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. In fact, the Business Member believes that, rather than impose a burden on competition, the proposed change will benefit competition because it will give all FINRA members more attractive options for trade reporting. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”³¹

Intramarket Competition. FINRA members currently use the FINRA/NYSE TRF to report approximately 20% of shares in NMS stocks traded OTC, compared to approximately 80% for the FINRA/Nasdaq TRF. Based on the Business Member's comparison of the information on the OTC Transparency Data Website with its own activity records, the Business

³¹ See note 11 [sic], supra.

Member understands that few, if any, Participants do all of their reporting on the FINRA/NYSE TRF.

The Business Member believes that pricing is the key factor for FINRA members when choosing which FINRA Facility to use. FINRA members can report their OTC trades in NMS stocks to a given FINRA Facility's competitors if they deem pricing levels at the other FINRA Facilities to be more favorable, so long as they are participants of such other facilities.

The proposed structure would exempt Retail Participants from the monthly fee for using the FINRA/NYSE TRF. The Business Member believes that doing so would not be a burden on intramarket competition, as the proposed rule change would align the fees of the FINRA/NYSE TRF with those of the FINRA/Nasdaq TRF, which does not charge its retail participants any fees for trade reporting.³² In addition, as noted above, the total fees paid by Retail Participants are relatively small: of the 35 Participants in December 2019, three were Retail Participants. Under the proposed rule, their monthly fees would go from \$2,000 to \$0.

With respect to Participants that are not Retail Participants, the proposed structure would take the Trade Report Count into account for every tier. At the same time, it would reduce the current focus on Market Share. Specifically, if a Participant had a Trade Report Count of 25,000 or less, its Market Share would not be a factor in determining its fee. By removing Market Share as a factor in determining the relevant tier for Participants with Trade Report Counts of 25,000 or less, the Trade Report Count would become the determinative factor. The Business Member believes that this proposed change would make the FINRA/NYSE TRF more competitive for Participants with a lower Trade Report Count, as their monthly fee would be tied to the number of trades, and not their size.

³² See note 15 [sic], supra.

The proposed changes to Rule 7620B would expand the tier structure from nine monthly Participant fees to 13. As a result, for a Participant on the upper edge of a tier range, a relatively small increase in Market Share would not result in as substantial a fee increase as under the present structure. As a result, the proposed structure would have more granularity than the current structure and the impact of changing tiers would decrease, making the FINRA/NYSE TRF more competitive with the FINRA/Nasdaq TRF.

The proposed fee schedule uses different threshold percentages for its tiers than the current fee schedule. The Business Member selected the proposed tiers and fees based on its evaluation of what thresholds and fees would create a more nuanced structure and would help address the described issues. In making its evaluation, the Business Member utilized its activity records and its analysis of the information on the OTC Transparency Data Website.

The Business Member does not believe that the proposed fee would place certain market participants at a relative disadvantage compared to other market participants, because the proposed fee schedule will be applied in the same manner to all FINRA members that are, or elect to become, FINRA/NYSE TRF Participants. It will not apply differently to different sizes of Participants. Different types of Participants will be treated the same except that, as noted above, Retail Participants will not be charged a fee. The proposed fees will be based on a Participant's activity on the FINRA/NYSE TRF. At the same time, by expanding the tier structure from nine monthly Participant tiers to 13, the proposed rule change would create a structure under which Participants' monthly fees would more closely correspond to the extent to which they use the FINRA/NYSE TRF in a given month.

As of December 31, 2019, there were 35 Participants, of which 18 were in the \$2,000 per month tier. Three of the remaining Participants were in the \$30,000 per month tier, one was in

the \$17,500 per month tier, three were in the \$10,000 per month tier, five were in the \$750 per month tier, and three were in the \$250 per month tier. Two were new Participants not yet subject to fees.³³ Assuming the number of Participants remained flat, the average fee incurred during December 2019 was approximately \$5,085 per Participant across the 35 Participants.

If there were no change in reporting to the FINRA/NYSE TRF, such that Participants' reporting volume stayed the same as it was in the final quarter of 2019, under the proposed fee schedule, the total monthly subscriber fees paid to the FINRA/NYSE TRF would decrease. More specifically, assuming there was no change in reporting to the FINRA/NYSE TRF, under the proposed fee schedule the average subscriber fee that would have been incurred would have been approximately \$4,478 across the 35 Participants, compared to approximately \$5,085 per Participant under the current fee. Of the 35 Participants, 28 would have no change in their fees and seven Participants would have a decreased fee or no fee. Of those seven, one would go from \$17,500 to \$15,000, one would go from \$10,000 to \$7,500, and two would go from \$10,000 to \$5,000. The three Retail Participants would go from \$2,000 to \$0.

The Business Member notes that the proposed changes in the fees for other Participants were not designed to offset the loss of Retail Participant trade reporting fees. Indeed, if there were no change in reporting to the FINRA/NYSE TRF, such that Participants' reporting volume stayed the same as it was in the final quarter of 2019, under the proposed fee schedule, the total monthly subscriber fees paid to the FINRA/NYSE TRF would decrease even if Retail Participants were not exempted from the monthly fee.

³³ As noted above, if a new Participant submits the participant application agreement and reports no shares traded in a given month, the Participant is not charged the monthly fee for the first two calendar months in order to provide time to connect to the FINRA/NYSE TRF.

Participants may potentially alter their trading activity in response to the proposed rule change. Specifically, those Participants that would incur higher fees may refrain from reporting to the FINRA/NYSE TRF and may choose to report to another FINRA Facility. Alternatively, such firms may continue reporting or new firms may start reporting to the FINRA/NYSE TRF if they find that the proposed net cost of reporting and other functionalities provided represent the best value to their business.³⁴ The net effect on any individual Participant of the proposed change in reporting fees will depend on whether it is a Retail Participant and, if not, its Trade Report Count and, for five tiers, its Market Share.

Lastly, the Business Member notes that Retail Participants and other Participants do not typically compete for the same business. As a result, the Business Member does not expect the proposed change to create a competitive advantage for Retail Participants relative to other Participants.

Intermarket Competition. The FINRA/NYSE TRF operates in a competitive environment. The proposed fee would not impose a burden on competition on other FINRA Facilities that is not necessary or appropriate. The FINRA Facilities have different pricing and compete for FINRA members' trade report activity. The pricing structures of the FINRA/NYSE TRF and other FINRA Facilities are publicly available, allowing FINRA members to make rational decisions regarding which FINRA Facility they use to report OTC trades in NMS stocks.

FINRA members can choose among four FINRA Facilities when reporting OTC trades in NMS stocks: the FINRA/NYSE TRF, the two FINRA/Nasdaq TRFs, or ADF. FINRA members

³⁴ The FINRA/NYSE TRF does not impose a fee on new Participants, and so a FINRA member that opts to become a Participant would not incur an additional cost from the FINRA/NYSE TRF. In some cases, a new Participant may incur incidental costs to connect to the FINRA/NYSE TRF, but those are not charged by the FINRA/NYSE TRF. An existing Participant that ceases to be a Participant is not subject to any change fee by the FINRA/NYSE TRF.

can report their OTC trades in NMS stocks to a given FINRA Facility's competitors if they determine that the fees and credits of another FINRA Facility are more favorable, so long as they are participants of such other facility.

The Business Member believes that in such an environment the FINRA/NYSE TRF must adjust its fees to be competitive with other FINRA Facilities and to attract Participant reporting. By making the FINRA/NYSE TRF more competitive with the FINRA/Nasdaq TRF, the Business Member believes that the proposed fee change will encourage more FINRA members to become FINRA/NYSE TRF Participants and use the FINRA/NYSE TRF, thereby increasing competition among the FINRA Facilities and giving FINRA members more attractive options for trade reporting.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act³⁵ and paragraph (f)(2) of Rule 19b-4 thereunder.³⁶ At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

³⁵ 15 U.S.C. 78s(b)(3)(A).

³⁶ 17 CFR 240.19b-4(f)(2).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-FINRA-2020-006 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File No. SR-FINRA-2020-006. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change. Persons

submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-FINRA-2020-006, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁷

J. Matthew DeLesDernier,
Assistant Secretary.

³⁷ 17 CFR 200.30-3(a)(12).

